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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DON PRUDHOMME RACING, INC., Plaintiff and Respondent, v. WYNN OIL COMPANY, Defendant and Appellant.	D038277 (Super. Ct. No. GIN003379)

APPEAL from a judgment of the Superior Court of San Diego County, Richard G. Cline, Judge. Affirmed.

Don Prudhomme Racing, Inc. (DPR) sued Wynn Oil Company (Wynn) for breach of contract after Wynn terminated its sponsorship agreement (the agreement) with DPR in part because one of DPR's drivers failed to appear on time to a promotional event. The court without a jury ruled DPR did not breach the agreement by appearing late at the promotional event; and, alternatively, if DPR's conduct was a breach, it was an immaterial breach providing no grounds for Wynn's termination of the agreement. Wynn

contends the court erred by relying on parol evidence to supplement the terms of the parties' sponsorship agreement and misinterpreting the contract's termination clause by failing to find it created either a condition precedent to Wynn's further performance, or a conditional option to terminate the contract that permitted Wynn to terminate without regard to materiality of the breach. Wynn further contends the court's finding that DPR's breach was not material is not supported by substantial evidence. We conclude the parties' agreement was not integrated as to the terms and conditions of DPR's personal appearances, and the court's conclusion that the parties reached an implied, supplemental, agreement on those matters — placing personal appearance schedules subordinate to DPR's racing responsibilities — is supported by substantial evidence. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises out of a failed sponsorship relationship between Wynn and DPR, founded by drag racing legend Don Prudhomme. Wynn was DPR's first and longest running sponsor, beginning when Prudhomme established DPR in 1968. Wynn sells automotive and industrial products through independent distributors, who Wynn considers its customers. Because its distributors looked to it to participate in car racing, Wynn sought to provide them benefit by entering into racing agreements by which it sponsored teams in various racing circuits. In 1999, Wynn had contracts with teams on six or seven racing circuits, each requiring the race teams to display the Wynn logo on their cars.

Towards the end of the 1998 racing season, Wynn felt it was not getting the benefit from its contract with DPR for several reasons, including because DPR gave it less attention than its larger sponsors. In November 1998, Wynn and DPR began negotiating the terms of Wynn's sponsorship for the 1999/2000 National Hot Rod Association (NHRA) racing season. Prudhomme and DPR's general manager Cory Watkins met with Wynn's president Mark Filowitz, its vice-president Donald DiCostanzo, and other Wynn staff. Filowitz told Prudhomme and Watkins that Wynn was cutting back on its promotional efforts and desired to sponsor only DPR's funny car, which was to be driven by Ron Capps, as opposed to both that car and the top fuel race car[1] that Wynn had sponsored in past seasons. Wynn also advised DPR it wanted only a one-year term. DPR responded to the cutback by expressing its preference that the new contract have a two-year term.

After the meeting, Watkins modified the parties' 1997/1998 agreement to reflect the differences discussed at the meeting, including by reducing the number of personal appearances to a maximum of ten.[2] Watkins sent the proposed agreement to Wynn's in-house attorney, who added the following clause:

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1 Wynn explains: "A 'funny car' resembles a normal sports car, but its engine is enhanced for high-speed drag racing, *i.e.*, very short, high-speed, straightaway races . . . . A 'top fuel dragster' car resembles Indy-style cars and is also used for drag racing. . . . 'Funny cars' and 'top fuel dragsters' race in different divisions of the National Hot Rod Association circuit."

2 The agreement for the 1997/1998 racing season had provided that Prudhomme, Dixon and/or Capps would make a *minimum* of 16 total personal appearances per year of at least one hour each on Wynn's behalf at mutually agreed dates and times. The

> "6. Termination. In the event (i) DPR breaches any provision of this Agreement, or (ii) Capps is unable to be the driver of the Funny Car for each race during the 1999 and 2000 racing seasons, Wynn shall have the right, but not the obligation, to terminate this Agreement immediately upon giving written notice to DPR at its last known address, and to exercise any and all other rights and remedies available to Wynn under law and equity. Such rights of Wynn include, but are not limited to, receiving from DPR a pro rata refund of any amount paid to DPR under Section 5 of this Agreement. In the event Wynn elects to terminate this Agreement pursuant to this section, Wynn shall not be obligated to pay DPR any additional amounts due under Section 5 of this Agreement."

The final agreement signed by Prudhomme and Wynn's general manager required DPR to (1) provide a driver and race team at all 22 NHRA sponsored events during the 1999 and 2000 seasons; (2) have Capps drive the funny car for each race unless physically unable; (3) prominently display Wynn's logo in prescribed sizes and locations including uniforms and Capps's helmet; and (4) endorse the use of Wynn's products in the funny car and Capps's and Prudhomme's personal vehicles. As to personal appearances, paragraph 2(F) of the agreement provided in part: "DPR shall cause Prudhomme and/or Capps to make a maximum of ten (10) personal appearances per year of at least two (2) hours each on behalf of Wynn's. These appearances will be on mutually agreed dates and times." The agreement also contained the following integration clause: "This Agreement represents the entire agreement between the parties with respect to the subject matter contained herein and may not be amended or modified except in a writing signed by authorized officers of both parties."

1997/1998 agreement had also granted Wynn the right to use either of DPR's vehicles for on-site displays, subject to availability and after prescribed advance notice. That provision was deleted from the 1999/2000 agreement.

In late January 1999, the Wynn representative responsible for scheduling personal appearances, Larry Nuber, contacted Watkins to request an early afternoon appearance on February 24, 1999, at a Chevrolet dealership in Phoenix, Arizona. Due to Nuber's lengthy experience in the racing industry, Wynn allowed him to operate with independence and did not require him to report to anyone at Wynn if he encountered problems with coordinating race appearances. Nuber made the request on behalf of one of Wynn's distributor customers, Kevin Strange. Watkins initially told Nuber DPR could not make the appearance on that day because, due to the funny car's poor performance at the season's first race, DPR had already reserved a race track and scheduled the car for testing. Later, Watkins received a call from Wynn's national counsel manager, Pat Dixon, urging DPR to "make this appearance happen" to satisfy the dealership. Watkins told Dixon Capps could make the appearance if they agreed on a flexible arrival time.

In the following days, Watkins recorded a number of telephone conversations in which he discussed various schedules with both Nuber and Dixon. In one of Nuber's faxes to Watkins regarding the appearance, Nuber wrote: "Please do not consider the race car appearance times FIRM. The hours will be about the time you and Pat Dixon discussed, but he has not spoken with the dealership, Classic Chevrolet. It will be within the 4-9 PM time period and the distributor knows he must select two hours for Ron. The distributor, Kevin Strange, is filling out an information sheet and each you and I will have copies. My preliminary guess for Ron is 6-8 PM." After confirming another unrelated matter, Nuber concluded: "Ron's only other obligation is to win both of these races."

Based on DPR's discovery responses and letters reiterating events surrounding scheduling of the appearance, Watkins testified DPR was "shooting for" Capps to appear at the Phoenix Chevrolet from 5:30 p.m. to 8:30 p.m., "subject to modification due to testing." Watkins explained the arrangement further in his deposition, pointing out that while he had confirmed on February 17, 1999, that Capps would be at the dealership from "roughly" 5:30 p.m. to 8:30 p.m. and the funny car would be there from 6:30 p.m. to 8:30 p.m., Nuber understood those times were subject to possible modification because of the testing, and the arrangement with him was that "Capps would be there for the three-hour period, and the car would be there for a two-hour period."[3]

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[3] The evidence as to the parties' agreement on the ultimate "start" time for the Phoenix event was in conflict. Nuber was deceased by the time of trial. At trial, Wynn's counsel questioned Watkins about his recollection of the agreed-upon personal appearance times for the Phoenix event, specifically highlighting a December 22, 1999, letter in which Watkins recounted the events surrounding the parties agreement after Wynn terminated the agreement. Counsel read from Watkins's deposition as follows:

"[Wynn's counsel]: 'Question: Does this letter, a December 22, 1999, letter, marked as Exhibit 1 in the Prudhomme deposition, refresh your recollection that you confirmed on February 17 that Capps would appear at Classic Chevrolet at approximately 5:30 and that he would stay at Classic Chevrolet until approximately 8:30?

" 'Answer: I don't think we're on the same page here. If you — If you take that paragraph and read everything from the beginning, it was a different schedule. It was if the schedule could be made to modify the appearance to really help out Wynn's with this account. I should quote. On February 17th we confirmed that Ron Capps would be at Classic Chevrolet from 5:30 to 8:30, and the race car would be there from 6:30 to 8:30. This is subject to possible modification of times due to testing. So what we arranged as a personal appearance with Larry Nuber and with Pat [Dixon] was that Ron Capps would be there for the three-hour period, and the car would be there for a two-hour period.

" 'Question: What was a "three-hour period."?

" ' Answer: I don't understand your question. A specific time period is what you're asking?

" ' Question: Yes. Was the three-hour period from roughly 5:30 to 8:30? Is that what you confirmed to Capps to Nuber on February 17?

DPR tested its funny car on February 24, 1999, as scheduled. During the last run, a malfunction occurred in the engine resulting in delays while the crew cleaned the car and got it ready for the appearance. Capps changed out of his fire suit, cleaned himself up and left for the dealership as soon as he could after the last run. He did not arrive there until approximately 7:00 p.m.

In December 1999, after Strange complained to him about DPR's Phoenix appearance, DiCostanzo sent DPR a letter advising it Wynn was exercising its right to terminate the agreement. Relying on the agreement's personal appearance and termination clauses, DiCostanzo cited as one of two grounds DPR's failure to appear at the Phoenix Chevrolet dealership on February 24, 1999.[4] DiCostanzo explained: "As a

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" ' Answer: That the time period would be there, yeah. Roughly from 5:30 to 8:30, yes. That's correct.

" 'Okay, I've got it. I apologize for keep going [*sic*] over this. I just want to be clear.

" 'Answer: Okay.

" 'You confirmed to Larry Nuber on February 17 that Ron Capps would be at Classic Chevrolet for roughly a three-hour period: Roughly 5:30 p.m. to 8:30 p.m., correct?

" 'Answer: Correct.' "

Kevin Strange, the Wynn distributor who requested the Phoenix event through Nuber, testified that while he was flexible on the date, he asked that the start time be no later than 4:00 p.m. Strange was never told the start time would be flexible, nor did Nuber tell him it might be affected by testing. He said he would not have agreed to a flexible start time in any event. As we read its order, the court found Nuber and Watkins reached an agreement as to appearance times that were subject to DPR's testing notwithstanding Strange's request.

[4] The letter provided: "During the 1999 racing season, Prudhomme Racing failed to cause either you or Ron Capps to make an appearance on behalf of Wynn's at two separate events, the dates and times of which Wynn's and Prudhomme Racing had agreed

result of these no-shows, Wynn's has lost confidence in Prudhomme Racing's ability to honor its commitments under the Agreement, and Wynn's has made the difficult but necessary decision to terminate the Agreement."

In February 2000, DPR filed a complaint against Wynn for breach of contract. The matter proceeded to a bench trial for a determination of whether DPR breached the personal appearance provision of the agreement by failing to appear at "mutually agreed dates and times." After addressing the parties' relationship and circumstances of the agreement's execution, the trial court made factual findings as to the parties' intent. Based on the evidence, it found Wynn and DPR "understood and agreed . . . that the racing of this car on the national circuit was the preeminent concern of both parties" and "all activities regarding the sponsorship were secondary to racing and related activities such as testing and repairs." It further found that "[b]oth parties acted more from an attitude of cooperation and mutual self-interest than from a position of strict contract performance" and "provided and received benefits for which they were not strictly obligated." The court found the times and places of personal appearances and the

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to in advance. On February 24, 1999, neither you nor Ron Capps nor anyone else from the Prudhomme Racing team appeared at an event at Classic Chevrolet in Phoenix, Arizona sponsored by Automotive Service Products. On September 29, 1999, neither you nor Ron Capps nor anyone else from the Prudhomme Racing team appeared at an event at Bozarth Chevrolet in Kansas City, Kansas sponsored by Farney's Distributing. In both cases, Prudhomme Racing had agreed to make the appearances well in advance of the event." DiCostanzo testified he considered Capps's 7:00 p.m. arrival in Phoenix the equivalent of a no-show. Wynn states its appeal is "limited to the breach involving DPR's failure to appear at the Phoenix event at the agreed-upon time." Accordingly, we do not consider the facts surrounding DPR's alleged failure to appear at the Kansas City event.

participation of Prudhomme, Capps and the funny car were determined by mutual agreement and that "appearance times were not exact."

As for Capps's late appearance at the Phoenix Chevrolet dealership, the court first resolved the conflicting testimony, finding the parties had agreed the Phoenix appearance would take place between 4:00 p.m. and 6:00 p.m.; that Capps and the funny car arrived at approximately 7:00 p.m; and that Capps and the race team acted "reasonably and with due diligence to arrive at the agreed appearance time." It then relied upon its finding that personal appearance dates and times were subordinate to testing and other racing activities to conclude the late appearance did not constitute a breach because "this personal appearance, like other off-site appearances, was subject to racing related events . . . ."

Finally, rejecting Wynn's argument that the termination clause permitted cancellation for any breach whether material or immaterial, the court concluded that even if DPR did breach the contract by failing to appear at the Phoenix Chevrolet dealership at the mutually agreed upon time, the breach was not material. It entered judgment in DPR's favor, awarding it $277,031.70 in damages plus interest and costs. Wynn appeals.

DISCUSSION

I. *Standard of Review*

We apply established appellate standards of review for this judgment following a bench trial. We begin with the settled principle that the interpretation of a written instrument generally presents a question of law for this court to determine anew, unless the interpretation turns on the credibility of conflicting extrinsic evidence. (*Parsons v.*

Bristol Development Co. (1965) 62 Cal.2d 861, 865; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 70-71.) When a contract is subject to different interpretations based upon contradictory extrinsic evidence, the interpretation of the contract evolves into one of fact for the trier of fact to which the reviewing court applies the substantial evidence standard of review. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912-915; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn*. (1992) 4 Cal.App.4th 1538, 1559-1562.) Where the evidence is undisputed and the parties draw conflicting inferences, the reviewing court will independently draw inferences and interpret the contract. (*City of El Cajon v. El Cajon Police Officers' Assn.*, *supra*, 49 Cal.App.4th at p. 71; *Parsons v. Bristol Development Co.*, *supra,* 62 Cal.2d at pp. 865-866, fn. 2.)

II. *Parol Evidence*

A. *Waiver*

Preliminarily, we address and reject DPR's contention, based on *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, that Wynn is barred from "raising a parol evidence rule objection" for the first time on appeal. Although Wynn asserts the court's consideration of parol evidence was in error, it is not challenging the mere admissibility of the evidence, a claim that *would* be waived by a failure to object. (*Tahoe National Bank v. Phillips,* at p. 23.) Rather, the crux of Wynn's argument is that the extrinsic evidence considered by the court is legally irrelevant and cannot support the judgment because it is inconsistent with an interpretation to which the parties' agreement is reasonably susceptible. Whether parol evidence is inconsistent with the terms of an

integrated written agreement is an issue of substantive law that may be raised for the first time on appeal. (*Ibid*; Wegner et al., Cal. Prac. Guide: Civil Trials and Evidence (The Rutter Group 2001) ¶ 8:3055, pp. 8E-219-220.) We therefore proceed to Wynn's substantive contentions.

B. *Integration*

Wynn contends the trial court erred in interpreting the personal appearance provision of the agreement by considering unspecified extrinsic evidence to add a "racing-related excuse" that is inconsistent with the parties' unqualified agreement that DPR's appearances would be made on mutually agreed dates and times. Wynn's argument is based on the premise, among others, that the agreement, including its provision as to DPR's obligation to appear at mutually agreed times and dates, is fully integrated and therefore cannot be supplemented or modified by any extracontractual evidence, whatever it may be. Wynn's premise is incorrect.

Under the parol evidence rule, evidence of a collateral oral agreement that was made prior to or contemporaneous with a written contract and that seeks to vary or contradict the terms of the written contract is not admissible if the written contract was intended as the final and full expression of the parties' agreement. (Code Civ. Proc., § 1856; *Alling v. Universal Manufacturing Corp*. (1992) 5 Cal.App.4th 1412, 1433; *Slivinsky v. Watkins- Johnson Co*. (1990) 221 Cal.App.3d 799, 804-805.) "The [parol evidence] rule derives from the concept of an integrated contract. When the parties to an agreement incorporate the complete and final terms of the agreement in a writing, such an integration in fact becomes the complete and final contract between the parties. Such a

contract may not be contradicted by evidence of purportedly collateral agreements. As a matter of law, the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself. The rule comes into operation when there is a single and final memorial of the understanding of the parties. When that takes place, prior and contemporaneous negotiations, both oral and written, are excluded." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.* (1993) 18 Cal.App.4th 1, 14.)

The substantive bar of the parol evidence rule becomes operative if the court determines the writing was an integration, that is, intended by the parties "as a final expression of their agreement with respect to such terms as are included therein . . . ." (Code Civ. Proc., § 1856, subd. (d).) An agreement may be only partially integrated, and in that event, the parol evidence rule applies to that part. (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) Whether an agreement is an integration is a question of law. (*Esbensen v. Userware Int'l, Inc.* (1992) 11 Cal.App.4th 631, 638, fn. 4 (*Esbensen*); *Slivinsky v. Watkins-Johnson Co*., 221 Cal.App.3d at p. 805; Code Civ. Proc., § 1856, subd. (d).) And where, as here, the trial court makes no finding on whether the contract at issue is integrated, the issue of integration is for the appellate court to determine. (*Malmstrom v. Kaiser Aluminum & Chemical Corp*. (1986) 187 Cal.App.3d 299, 314, citing *Bert G. Gianelli Distributing Co. v. Beck & Co*. (1985) 172 Cal.App.3d 1020, 1037-1038.)

In deciding the question of integration, we may look to various factors such as the writing itself, including whether the written agreement appears to be complete on its face

and/or contains an integration clause; whether the alleged oral understanding on the subject matter at issue might naturally be made as a separate agreement; and the circumstances surrounding the time of the writing. (*Masterson v. Sine*, *supra*, 68 Cal.2d at pp. 225-226; *Esbensen*, *supra*, 11 Cal.App.4th at p. 637.)

We conclude the agreement in this case was only partially integrated. The agreement itself is the most persuasive evidence of the parties' objective mutual intent. (Civ. Code, § 1638.) While the agreement contains an integration clause expressly providing it is the "entire agreement between the parties," the clause further states it is the entire agreement "with respect to the subject matter *contained herein*." The specifics as to Capps's personal appearances, apart from the fact they were to be mutually agreed upon, were not set forth in the written agreement. Indeed, on its face, the agreement explicitly left scheduling of personal appearances to future agreement.[5] While the

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[5] Neither party argued before the trial court, or argues here, that the personal appearance provision of the agreement is an uncertain and therefore unenforceable provision to agree in the future. (See *Okun v. Morton* (1988) 203 Cal.App.3d 805, 817.) In *Ablett v. Clauson* (1954) 43 Cal.2d 280, the court explained: "The general rule regarding contracts to agree in the future is stated to be as follows: 'although a promise may be sufficiently definite when it contains an option given to the promisor or promisee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.' [Citation.]" (*Id*. at pp. 284-285; see also *Etco Corp. v. Hauer* (1984) 161 Cal.App.3d 1154, 1158.) If Wynn were to advance this theory to invalidate the agreement, our conclusion would not change under the settled principle that "partially illegal contracts may be upheld if the illegal portion is severable from the part which is legal." (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 384; see also *Wolitarsky v. Blue Cross of California* (1997) 53 Cal.App.4th 338, 344.) Applying this rule, we would construe the contract to invalidate only the personal appearance provision, leaving the remainder of the contract

agreement was complete with respect to the terms contained within it, it was plainly not the final expression of the parties' agreement as to the particulars of DPR's personal appearances.

Wynn concedes the agreement does not purport to establish particular dates and times for personal appearances; it nevertheless maintains the fact the parties may later agree does not undermine the finality of the agreement as to those terms stated within it, including the term that appearances will be scheduled by mutual agreement. Wynn maintains the agreement's language demonstrates the writing is complete unto itself because the mutual agreement clause constitutes a "process" or "mechanism" for scheduling personal appearances in the future, similar to a dispute resolution provision in a contract.

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intact. " ' "Whether a contract is entire or separable depends upon its language and subject matter, and this question is one of construction to be determined by the court according to the intention of the parties." ' " (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122.) Here, severance would be consistent with the policies underlying the rule against voiding the entire contract. First, the evidence demonstrated that up until Wynn (through Nuber) first complained to DPR in November 1999, DPR and Capps competed in every event, displayed Wynn's logos, endorsed Wynn's products and otherwise complied with its obligations under the agreement. Thus, in view of its partial performance, severance would prevent DPR from suffering undeserved detriment. (*Id*. at pp. 123-124.) Further, severance is appropriate because "conserv[ing] [the] contractual relationship . . . would not be condoning an illegal scheme [and is in] ' "the interests of justice . . . ." ' [Citations.]" (*Id*. at p. 124.) Severance would not be inconsistent with the parties' intent; it is undisputed that the 1999/2000 sponsorship contract was changed to provide for a *maximum* of ten personal appearances, permitting DPR to reasonably meet its obligation under this provision with only a single personal appearance. This was a significant reduction from the previous contract which provided for a *minimum* of 16 appearances and reflected the lower level of importance Wynn placed on those appearances.

The argument is without merit. Wynn appears to rely upon the principle expressed in *Marani v. Jackson* (1986) 183 Cal.App.3d 695 that where terms are "covered so explicitly and so extensively" in a contract, a court may not conclude the term would be naturally be made as a separate agreement. (*Id*. at p. 703.) The principle is obviously inapplicable here. A bare provision obligating the parties to mutually agree in the future is not comparable to a dispute resolution clause, which typically contains guidelines or some objective method for reaching agreements. Courts can enforce such provisions containing objective mechanisms by which the parties must agree on an unspecified future term. (See *Ecto Corp. v. Hauer*, *supra*, 161 Cal.App.3d 1154.) While *Ecto Corp. v. Hauer* did not address the issue of integration, it addressed the enforceability of an option provision in a lease that left the rental amount upon extension to be "determined by mutual agreement at that time." (*Id*. at p. 1156.) It concluded that such a provision is enforceable only if the lease agreement contains an ascertainable standard for the determination of such rent. (*Id*. at p. 1161.) Reviewing out of state authorities addressing the issue, it explained that some courts found an example of a provision with a prescribed method for determining future rent would be one requiring determination by arbitration or appraisal, or with reference to fair market rents. (*Id*. at p. 1157.) The *Ecto* court observed those courts would enforce such agreements under the reasoning they are not making a new contract for the parties but merely are compelling them to do what they contemplated at the time they initially contracted. (*Id*. at pp. 1157-1158.) Applying California law, the court concluded the provision at issue, leaving rent upon extension to

be "determined by mutual agreement at that time" was not enforceable because it contained no ascertainable standards for determining rent. (*Id*. at p. 1156.)

The provision here, in which the parties agreed to mutually agree to DPR's appearance schedules, likewise expresses no standards for the establishment of those schedules. The agreement's language bound neither party to any particular objective criteria for reaching an agreement on the matter. Absent such criteria or standards, the provision does not constitute the enforceable "mechanism" that Wynn proposes. Indeed, the clause is generally not enforceable on the theory that courts will not write contracts for parties in the event the parties themselves cannot agree. (*Ecto Corp. v. Hauer*, *supra*, 161 Cal.App.3d at pp. 1160, 1162.) This authority assists our decision that the agreement was plainly absent any terms and conditions of DPR's personal appearances and therefore was not, and could not be, the party's complete and final agreement on those matters.

Our conclusion pertaining to the agreement's partial integration is supported by the circumstances surrounding the negotiations for Wynn's sponsorship of DPR for the 1999/2000 season. We have found no evidence, nor have the parties cited any, that indicates they specifically discussed the terms and conditions of Capps's personal appearances, other than to decrease them in number. It was undisputed that due to financial considerations Wynn intended to reduce its sponsorship budget and consequently its involvement with DPR, including by significantly reducing DPR's obligation to make personal appearances to a maximum of ten appearances for Capps, without any obligation to bring a race car. While DiCostanzo testified Wynn considered personal appearances important, the reduction in DPR's obligations demonstrated that

Wynn did not place as much importance on those appearances as it previously had. For its part, DPR did not consider Wynn a major sponsor; due to the smaller amounts of money it advanced, Wynn was considered only an associate sponsor. Further, the evidence was undisputed that Wynn scheduled DPR's appearances through Nuber, who was not involved in the contract negotiations. Given Wynn had assigned Nuber the responsibility for arranging its promotional appearances with DPR, it would be natural for the parties to omit specific terms and conditions pertaining to those events from the written contract. This is particularly true where the appearances necessarily were to be scheduled at later dates; had to accommodate DPR's racing schedule (as DPR was obligated to ensure Capps and the funny car participated in each of the 22 NHRA sponsored events); and would as a practical matter vary in times and length depending on the differing locations. In short, additional oral understandings pertaining to DPR's personal appearances are not matters that, if made, "would certainly" have been included in this written instrument. (*Masterson v. Sine*, *supra*, 68 Cal.2d at p. 228, 229.)

C. *Extrinsic Evidence is Admissible to Supply an Implied Term Subordinating DPR's Personal Appearance Schedule to its Racing Obligations*

Because, as we interpret it, the agreement was not the final embodiment of Wynn and DPR's intentions as to DPR's personal appearance obligations, extrinsic evidence was admissible to prove additional terms pertaining to that clause. (*Masterson v. Sine*, *supra*, 68 Cal.2d at p. 225 ["When only part of the agreement is integrated, the [parol evidence] rule applies to that part, but [extrinsic] evidence may be used to prove elements of the agreement not reduced to writing. [Citations.]"]; see also *Hayter Trucking, Inc. v. Shell*

Western E&P, Inc., supra, 18 Cal.App.4th 1, 14; *Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 730; *BMW of North America v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 990-991, fn. 4.) Accordingly, we turn to the question of whether extrinsic evidence is admissible to prove an implied term of the contract that is not inconsistent with the writing. (*Esbensen, supra*, 11 Cal.App.4th at p. 638.)

This question should not be confused with the parol evidence rule. "The courts have long recognized that even when a contract is integrated . . . the meaning of the terms of the contract must still be ascertained. The California Supreme Court has repudiated the obsolete 'plain meaning' component of the parol evidence rule, and permits the admission of extrinsic evidence to interpret the language of an integrated written instrument where such evidence is relevant to prove a meaning to which the contract language is 'reasonably susceptible.' [Citations.]" (*Morey v. Vannucci, supra*, 64 Cal.App.4th at pp. 912-913, fn. 4; see also *Pacific Gas & Electric Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 38-40.) Because we are focused on interpreting the unintegrated personal appearance provision, we apply standard principles of contract interpretation.[6]

Here, the trial court looked to usage and custom to supply an implied term to the contract, namely an agreement between the parties that DPR's personal appearance schedule would be subject and subordinate to its racing obligations, including testing and

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6 This does not mean we may interpret the agreement to give it a meaning that would vary, add to or contradict the *integrated* terms of the agreement. (*Esbensen, supra,* 11 Cal.App.4th at p. 638.)

maintaining its car to ensure its race worthiness. " 'Usage' is a uniform practice or course of conduct followed in certain lines of business or professions, or in some procedure or phase of a business or profession. When an established usage is known to the parties to a transaction, it becomes a rule of law which the courts will recognize in determining the rights of parties whose relations come within the usage, absent a controlling statute. [Citation.]" (*Hayter Trucking, Inc. v. Shell Western E&P, Inc.*, *supra*, 18 Cal.App.4th at pp. 15-16. " 'Usage or custom may be looked to, both to explain the meaning of language and to imply terms, where no contrary intent appears from the terms of the contract.' [Citations.] Generally, '[u]sage can be invoked only to interpret, not create contractual terms [citations]. But a reasonable usage may supply an omitted term or otherwise supplement an agreement.' [Citation.]" (*Varni Bros. Corp. v. Wine World, Inc.* (1995) 35 Cal.App.4th 880, 889, citing Civ. Code, § 1655 & 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 696, pp. 629, 630; see also *Denver D. Darling, Inc. v. Controlled Environments Const., Inc.* (2001) 89 Cal.App.4th 1221, 1237.) In *Varni*, the court further explained the limitations on these rules: "[W]here a written contract states a term clearly and unambiguously, usage or custom that would vary or contradict the term is not admissible. [Citations.] Similarly, where the parties contradict each other on whether a certain term was part of a contract based on their precontract discussions, usage or custom is not admissible to prove that one party's version of the terms of the contract was more probable. [Citations.]" (*Varni*, *supra*, 35 Cal.App.4th at p. 889-890.) In that case, the court of appeal found neither situation present because there was neither a written contract expressly covering the subject at hand (termination of implied distributing

agreements) nor was there any discussion by the parties regarding the subject. (*Id*. at p. 890.)

This case presents the same circumstances. The written sponsorship agreement does not address the scheduling of DPR's personal appearances, and as stated, there is no evidence the parties discussed scheduling (as opposed to the number of personal appearances, which we infer they discussed) at the time they negotiated the contract. Thus, as in *Varni*, custom and usage is admissible to prove the nonintegrated portion of the agreement contained an additional implied term that personal appearance schedules were subordinate to race-related priorities such as vehicle testing and maintenance. On this issue, the trial court made certain findings as to the history of the parties' dealings and their mutual goals. The court noted Wynn and DPR had operated not from a position of strict contract performance, but from one of mutual self-interest and cooperation, providing benefits and "perks" not called for under their contract. It further found the parties' mutual self-interest focused upon the importance of successful racing: "[T]he parties understood and agreed that Capps was the driver of the Funny Car and that the racing of this car on the national circuit was the pre-eminent concern of both parties. DPR had a history and reputation of winning. From that flowed the publicity to the sponsors and the value of the sponsorships. It was understood and agreed by Wynn and DPR that all activities regarding the sponsorship were secondary to racing and related activities such as testing and repairs." Although Wynn argues the record does not contain evidence of the parties' custom and usage, it does not directly challenge these findings.

These background findings and the court's final finding as to the inferior priority of personal appearances (encompassed within "all activities regarding the sponsorship") are supported by substantial evidence. Prudhomme, who personally had the longest relationship with Wynn and was the one person most familiar with the parties' practices, testified he considered Wynn paid its large sum of money to DPR for racing all over the country, the performance of the race car, and winning championships. He explained that because Wynn's sponsorship was very important to DPR, as were all of its sponsors, DPR provided Wynn and its other sponsors with "perks" not called for in its contracts. These included a hospitality area with a tent and large bus to allow sponsors to sit down with and spend time with him and DPR's drivers or obtain their autographs. And Wynn provided DPR with specially manufactured oil that was not otherwise commercially available, under no contractual obligation to do so.

Further, as the court acknowledged, Nuber played an important role in assessing the parties' understandings. Nuber was Wynn's agent in scheduling personal appearances; according to Prudhomme, it was well known in the industry that Nuber was Wynn's representative for racing. As DiCostanzo acknowledged, Nuber was a "legend" and "insider" in the racing industry and had a national reputation as a consultant. Nuber thus acted with great independence on Wynn's behalf. The evidence demonstrated Nuber understood winning races was both Wynn's and DPR's priority, acknowledging in one communication that Capps's only other obligation was to "win these races." The court could reasonably infer based on the fact Nuber had been with Wynn since at least 1996, that when Wynn entered into the 1999/2000 contract it was aware Nuber would give

priority to DPR's racing obligations in reaching agreements on the terms and conditions of personal appearances. The notion that the parties considered personal appearances secondary to racing activities is further supported by evidence that, although DPR failed to meet its obligation to make a minimum of 16 personal appearances under the 1997/1998 agreement, Wynn continued to perform under that contract and elected to enter into a new contract for 1999/2000.[7] To the extent Wynn challenges the evidence supporting the trial court's finding that the parties considered personal appearances secondary to DPR's racing obligations providing the basis for its addition of such term to the agreement, we hold those findings are amply supported by substantial evidence of the parties' practices.

The additional implied term does not contradict the otherwise integrated portions of the agreement. Nothing in the contract prevented Wynn, through Nuber, and DPR from mutually agreeing to lenient appearance schedules. And additional terms relating to the scheduling of personal appearances, including terms reflecting that the schedule was intended by both parties to be subject to mutually-agreed conditions, cannot contradict unstated elements of the contract (i.e., dates, times and flexibility, if any, of Capps's personal appearance schedule). The court did not interpret the agreement as permitting DPR to unilaterally decide not to appear if it could not due to racing obligations, rather,

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[7] The fact the 1997/1998 agreement did not contain a termination provision is irrelevant if DPR's failure to perform an express obligation was in any event a breach. Thus, we reject Wynn's assertion that its conduct with respect to its 1997/1998 season provides no basis to infer custom and usage (or as it terms it, course-of-dealing) between the parties.

as we view its findings, it interpreted the agreement to insert a term essentially providing that the parties mutually understood and agreed DPR's priority, in the event of conflicts with personal appearance schedules, was to meet its racing obligations.

Finally, we reject Wynn's contention that even if the parties agreed to a racing-related excuse, it would not excuse Capps's late arrival to the Phoenix event because the evidence showed only that the funny car, not Capps, was delayed due to testing. Capps testified that after the last test run on the day of the Phoenix appearance, he unsuited and left for the dealership as soon as he could, without delay. Contrary to Wynn's argument otherwise, this provides substantial evidence for a conclusion that Capps's appearance schedule was affected by necessary racing activities.

The court correctly concluded, based on its resolution of conflicting extrinsic evidence and interpretation of the agreement, that DPR did not breach the personal appearance provision of the agreement when Capps arrived to the Phoenix event at 7:00 p.m. Its judgment on this point is supported by the evidence and applicable canons of contract interpretation. Given our conclusion, we need not reach Wynn's remaining contentions on appeal.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McCONNELL, J.